No. 94-232

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and PHILIP COOMBE, JR., as Acting Commissioner of the New York State Department of Correctional Services,

Petitioners,

against

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Parties

The parties to the proceeding below were:

1. Lee S. Rumsey, Plaintiff;

2. Douglas DiGerlando, Plaintiff;

3. Michael Rhodes, Plaintiff;

4. Thomas Graves, Plaintiff;

5. New York State Department of Correctional Services, Defendant;

6. Thomas Coughlin, III, as Commissioner of the New York State Department of Correctional Services, Defendant.

Plaintiffs Rumsey, DiGerlando, Rhodes, and Graves brought suit individually and as representatives of a class of persons similarly situated.

Commissioner Coughlin retired from his position as Commissioner of the New York State Department of Correctional Services effective August 11, 1994. Philip Coombe, Jr., who is currently Acting Commissioner of Correctional Services, has been substituted as a respondent in this matter pursuant to Supreme Court Rule 35.3.

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RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

Respondents respectfully refer the Court to the Statement of the Case beginning at page 3 of respondents' own earlier Petition for Writ of Certiorari dated July 29, 1994, Docket No. 94-191, for a summary of the facts giving rise to this litigation and would urge the Court to consider both petitions jointly.

REASONS FOR DENYING THE WRIT

I. The petition does not satisfy the criteria for invoking this Court's discretionary jurisdiction.

Petitioners seek to invoke the discretionary jurisdiction of this Court without satisfying its prerequisites. There is no showing of any real intercircuit conflict or that the decision below so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. See *N.L.R.B. v. Pittsburgh Steamship Company,* 340 U.S. 498, 502 (1951); Rules of the Supreme Court of the United States, Rule 10(a).

At best, in the Question Presented petitioners frame a unique situation affecting primarily the particular litigants in this action, not the public at large. See *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). Here, a viable breach of contract cause of action is contained within, and forms the basis of, respondents' claim under the Veterans' Reemployment Rights Act ("Veterans' Act"). The Court of Appeals found the breach of contract claim

viable but not the Veterans' Act claim. This situation is not likely to recur with any frequency. Therefore, a decision by this Court will not provide any broad policy guidance for issues routinely confronting the lower courts. Furthermore, given the distinguishable factual issue presented by this petition, even if the Second Circuit's refusal to dismiss for lack of jurisdiction was erroneous, that determination may be allowed to stand because it is of limited, or no, precedential value. Certainly denial of certiorari, itself, carries with it no implication regarding this Court's views on the merits of this petition. *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 919 (1950).

Inasmuch as petitioners cite no "special and important reasons" for granting certiorari and the case's precedential value is minimal, at best, whether certiorari is denied or granted the writ should be denied.

II. A fair result has been reached by the Court of Appeals and reversal of its decision based on *Pennhurst* would be highly prejudicial to the respondents' rights.

The Court of Appeals did err in reversing the finding of the Honorable Con. G. Cholakis, Judge of the District Court, with respect to the petitioners' liability under the Veterans' Act. (See Petition for Certiorari of respondents filed August 1, 1994, Docket No: 94-191). However, the Court of Appeals at least reached a fair result in affirming the District Court's finding of petitioners' liability in contract.

In 1982 the petitioner commenced discriminating against the respondent class members solely because they were members of the military reserve. Petitioners switched and, in effect, took away respondents' days off when respondents requested military leave under the New York Military Law to fulfill their reserve obligations. (Appendix "C", 59a). This discriminatory conduct continued for almost a five-year period until February 19, 1987 when the District Court ruled that the conduct violated both the Collective Bargaining Agreement between the respondents' union and petitioners as well as §2021(b) (3) [now 4301(b) (3)] of the Veterans' Act (Appendix "D", 85a). During that five-year period the 980 class members had over 15,000 days off switched and lost. The remaining nonreservist Correction Officers (approximately 15,000 in 1986, JA, A106) had a total of not more than eleven (JA, A170-76, 204-215) pass days switched and lost. The District Court thus found that only respondent class members were "regularly and consistently" having their pass days changed (Appendix "D", 79a). The District Court's finding with respect to the violation of the Collective Bargaining Agreement and the one and one-half days' pay for each day lost was properly affirmed by the Court of Appeals. Thus, at least the Court of Appeals' decision, as it stands, reached a fair result in compensating the respondent class members for damage done to them.

An unfair result, however, will be reached if certiorari is granted and the Court of Appeals' decision is reversed. In order to assert their rights under the Veterans' Act, the respondents were required to bring an action in the United States District Court. See *Firemen's and Policemen's Pension Fund Board of Trustees of San Antonio, Texas v. Lott,* 742 S.W.2d 730 (Court of Appeals of Texas, 1987) *cert.*

denied, 488 U.S. 927 (1988) (Holding that, according to federal legislative history, federal courts have exclusive jurisdiction of such claims). Now, twelve years after the case has been fully litigated and all Courts that have reviewed the matter agree that respondents' rights have been violated and specific damages have been stipulated to by the parties, petitioner would have respondents start the whole litigation process over again in some other forum. Such a process would most surely be prejudicial to respondents due to the passage of time, the death or other unavailability of witnesses, additional expense and the possible running of relevant statutes of limitations in state forums.

III. In the event this Court were to find in favor of petitioners, the action should be remanded for an adjudication of respondents' remaining federal statutory claim.

In addition to their claim under section 4301(b)(3) of the Veterans' Act, respondents have also alleged and proven a claim arising under §2024(d) of the Veterans' Act.[1] Contrary to the dictates of that provision, respondents were not granted leave of absence "upon request"; rather, in order to

[1]38 U.S.C. §2024(d) has been relocated to 38 U.S.C. 4304(d) and provides, in pertinent part, as follows:

> Any employee . . . [who is ordered to a period of active duty for training of less than 12 consecutive weeks] . . . *shall upon request be granted a leave of absence* by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release . . . such employee *shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.* . . . [emphasis supplied]

attend military drill they had to give up their day off. Such a *quid pro quo* does not comport with the statute.

Nor were respondents permitted to return with such seniority or status as they would have had if they had not been absent for military leave. Solely because of their obligation to attend ordered military training, respondents lost the regularly scheduled day off to which they were entitled by their seniority. It is not disputed that they would have retained their regularly scheduled day off if they had not been required to be absent from work for purposes of military training.

Despite sufficient proof in the record in support of this claim, the District Court declined to rule on it, relying instead on section 4301(b)(3). Accordingly, even if this Court were to grant the instant petition and rule favorably on the jurisdictional issue raised by petitioners, rather than being dismissed, this case should be remanded for consideration of respondents' 2024(d) [now 4304(d)] claim. See e.g. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 125 (1984).

Conclusion

For the foregoing reasons, respondents respectfully submit that the writ of certiorari should be denied, or, in the alternative, the case should be remanded for consideration of respondents' remaining federal claim.

Dated: September 2, 1994
Albany, New York

Respectfully submitted,

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